IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8898 OF 2004

Shri Prakash manohar Bhasme,)
Age 49 years, Occ - Business,)
Residing at 528, Shukrawar Peth,)
Pune - 411 002.).. Petitioner
(Org.Defendant)

Vs.

Mrs.Rohini Ramakant Rawal,)
Age 52 years, Occ- Service,)
Residing at 528, Shukrawar Peth,)
Pune - 411 002.).. Respondent
(Org.Plaintiff)

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Shri Sanjeev J. Rairkar for the petitioner.

Shri S.N.Chandrachood for the respondent.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 2nd NOVEMBER, 2004.

ORAL JUDGMENT :

1. Heard the learned Advocates for the parties. Perused the records. Rule. By consent, rule is made returnable forthwith.

2. The petitioner challenges the decree of eviction passed by the trial Court and confirmed by the lower appellate Court on the ground of default in payment of rent as well as on the ground that there

was no service of summons upon the petitioner in accordance with the provisions of law in relation to service of summons prescribed under Order V Rules 17 and 20 of the Code of Civil Procedure. The respondent, on the other hand, justifies the impugned order considering the failure on the part of the petitioner to comply with the mandatory requirement of the provisions of law contained in Section 12(3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter called as "the said Act".

3. The learned advocate for the petitioner drawing attention to the Rules 17, 19A and 20 of the Order 5 of the Code of Civil Procedure, as were in force at the relevant time and placing reliance in the decision of the Apex Court in **Sushil Kumar Sabharwal v. Gurpreet Singh & Ors.,** reported in (2002) 5 SCC 377, has submitted that the lower appellate Court did not apply its mind to the point sought to be raised by the petitioner in relation to the failure on the part of the trial Court to comply with the mandatory requirement in relation to the service of the summons prior to proceeding with the suit against the petitioner/original defendant in the suit, and therefore, the decree passed by the trial Court was

without any opportunity of being heard to the petitioner, and in that sense, apart from being contrary to the provisions of law, the same was against the basic principles of natural justice. It is further contended that the trial Court could not have proceeded to pass the order ex parte against the petitioner unless the petitioner was served with the summons in the matter, in accordance with the provisions of law. The learned advocate for the respondent, on the other hand, has submitted that the findings arrived at by both the Courts below disclose the satisfaction on the part of the Court about due compliance of the provisions of Rule 17, and therefore, substituted service was ordered and yet the petitioner did not participate in the proceedings. He further submitted that, once it was known to the petitioner about the eviction proceedings, if he wanted to contest the same it was necessary for the petitioner on the very first day of the hearing of the proceedings in the appeal which is continuation of the suit to pay or deposit all the arrears of rent, however, the petitioner did not do so, besides that he has not paid the rent for more than last five years, and considering the same, there is hardly any case for interference in the impugned order.

4. The judgment and decree passed by the trial Court discloses that the suit proceeded ex parte from 16th June, 1998. In the Appeal, the petitioner had specifically raised the point regarding non compliance of the provisions of law in relation to the service of summons and in that regard, the lower Appellate Court has observed that after initial attempts of service of suit summons by the bailiff on the defendants, the plaintiff applied for substituted service in terms of Order 5 Rule 20(1) of the Code of Civil Procedure on the ground that the petitioner was avoiding service of the suit summons and the same was granted. It has also been recorded that the bailiff report dated 12th March, 1999 was submitted by supporting affidavit of the bailiff, and therefore, the lower Appellate Court found that the service was proper and effective and as such there was no irregularity in that regard.

5. Undoubtedly, mere irregularity in the service of summons cannot be a justification for interference in the orders passed by the Courts below in exercise of writ jurisdiction. However, if it is disclosed that there was absolutely no service of summons in accordance with the provisions of law comprised under Rules 17 and 20 of Order 5, certainly any order by the trial Court to direct the suit to proceed ex parte

would be clearly in contravention of provisions of law relating to the procedure prescribed under the Code of Civil Procedure, besides being in violation of basic principles of natural justice, resulting in miscarriage of justice.

6. The Apex Court in **Sushil Kumar Sabharwal's case (supra)**, while considering the scope of the Rule 17 of Order 5 and with reference to the facts of the case before the Apex Court, had observed that several infirmities and lapses on the part of the process server, though it was alleged that there was refusal by the defendant to receive the summons, the process server did not affix copy of the summons of the plaint on the wall of the shop nor there was any endorsement made by him overleaf the summons in that regard. Besides, tendering of summons and its refusal as well as affixing of summons and copy of the plaint on the wall of the shop has to be done by the person who can identify the defendant and the location of the suit premises and there has to be documentation or report in relation to such procedure having been followed by the process server. Considering the lapses in that regard, the Court had refused to believe the affidavit filed by the process server in relation to the service of the summons for compliance of Rule 17 of Order 5 of

the Code of Civil Procedure.

7. In the case in hand, the observations by the Court in relation to the service of the summons merely relate to the existence of the bailiff's report regarding attempt of service of summons on the defendant and the application by the plaintiff for substituted service in terms of Order 5 Rule 20(1) of the Code of Civil Procedure on the ground that the defendant is avoiding the service of the summons and thereupon the same has been granted by the trial Court. Obviously, there is nothing on record to disclose the satisfaction of the trial Court to the effect that there was reason to believe that the defendant was avoiding the service, or that for any other reason the summons could not be served in the ordinary way before permitting the respondent to serve the petitioner by way of substituted service. Considering the provisions of Rule 20 Order 5 of the Code of Civil Procedure, it is absolutely necessary for the Court to satisfy itself that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that there is any other reason to believe that the summons cannot be served on him in ordinary way and only on satisfaction in that regard and the same being

reflected in the order passed by the Court, the question of granting leave to the plaintiff to serve the defendant by substituted service can arise.

8. As regards the Rule 17, it elaborately prescribed the procedure to be followed by the process server in relation to the summons upon the defendant. It clearly requires the serving officer to affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, in cases where the defendant or his agent or other person authorised to accept the summons refuses to sign the acknowledgment of the summons, or where the serving officer after using all due and reasonable diligence, cannot find the defendant, later being absent from his residence at the time when the service was sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time nor there is any agent empowered to accept the service of the summons on his behalf, nor any other person on whom service can be made. In other words, in case the process server finds that the defendant or his agent or authorised person refuses to sign the acknowledgement or the defendant or his agent or

authorised person is not available to receive the summons at the residence of the defendant then the process server has to affix the copy of the summons and the plaint on some conspicuous part of the house of the defendant or place of his business. The matter does not end there. It is further necessary for the process server to make an appropriate report in that regard and disclose in such report the circumstances under which he had to affix the summons and the copy of the plaint on the premises and further shall disclose the name and address of the person, if any, by whom the house was identified and in whose presence, a copy thereof was affixed.

9. Rule 19 further requires that where such a summons is returned under rule 17, the Court shall, if the returned under that rule has not been verified by the affidavit of the serving officer, and may, even if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit. Obviously, merely because a summons is returned under the rule 17, the Court cannot accept the same without

proper satisfaction thereof about due compliance of the obligation by the process server under Rule 17 of Order V. The Court can even hold necessary inquiry in that regard before declaring service of summons and in case it is not satisfied, it can order fresh service of summons. Rule 19A of Order 5 of the Code of Civil Procedure, which was in force at the relevant time, required simultaneous issue of summons for service by post in addition to personal service.

10. Plain reading of Rules 17, 19, 19A and 20 of Order V therefore would disclose that the Court cannot proceed to pass an order for substituted service as a matter of course, but the Court has to satisfy itself that there has been every attempt made by the plaintiff with the help of process server to serve the summons in the suit. Only upon proper satisfaction in that regard, the Court can allow the plaintiff to serve the defendant by substituted service and on such substituted service being made, if the defendant fails to appear in the Court, the Court can proceed to pass an order ex parte and not otherwise. If the Court ignoring the mandatory requirements of Order V Rules 17, 19 and 19A proceeds to deal with the matter ex parte against the defendant, certainly such an exercise would be bad in law. Undoubtedly, the

provisions of Rule 19A are no more in force. However, the provisions of Rules 17 and 19 are required to be complied with in accordance with the said mandatory provisions of law and failure in that regard would result in miscarriage of justice inasmuch as it would deny fair opportunity to the defendant to contest the proceedings and to putforth his case before the Court in order to enable the Court to arrive at just and proper decision in the matter.

11. Considering the relevant provisions of law and the decision of the Apex Court in **Sushil Kumar Sabharwal's case (supra)**, therefore, it is apparent that there was no service of summons even in accordance with the Rule 17 of Order V of the Code of Civil Procedure in the case in hand, and therefore, the entire proceedings against the petitioner were bad in law.

12. There is, no doubt, Section 12(3) of the Bombay Rent Act, which provides that no decree for eviction shall be passed by the Court in any suit for recovery of possession on the ground of arrears of standard rent and permitted increases if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders

in Court the standard rent and permitted increases then due and together with simple interest on the amount of arrears of such standard rent and permitted increases at the rate of nine percent per annum, and thereafter continues to pay or tenders in Court regularly such standard rent and permitted increases till the suit is finally decided and also pays cost of the suit as directed by the Court provided that the relief provided under the said sub-section shall not be available to a tenant to whom relief against forfeiture was given in any two suits previously instituted by the landlord against such tenant. Referring to the said provision, it was sought to be contended that once the petitioner had learnt about the ex parte decree on 25th January, 2000 and thereafter he had filed the appeal against the decree, it was necessary for the petitioner either to pay or tender arrears of rent in order to avoid ex parte decree. However, in the case in hand, once it is established that the party had no opportunity to contest the proceedings even at the original stage itself, the question of expecting the petitioner to comply with the provisions of Section 12(3) of the said Act, and that too at the appellate stage, cannot arise, and on that count, the petitioner cannot be made to suffer from an order of eviction which has

been passed without affording him sufficient opportunity to contest the suit on merits. The contention on behalf of the respondent that on account of failure on the part of the petitioner to deposit the rent on the very first day of the appeal, therefore cannot be a justification to dismiss the petition or to deny opportunity to the petitioner to contest the suit on merits.

13. For the reasons stated above therefore the impugned orders passed by the lower appellate Court as well as by the trial Court cannot be sustained. The matter needs to be remanded to the trial Court to deal with the same by giving opportunity to the petitioner to contest the proceedings from the date of filing of the written statement by the petitioner. For all purposes, the date of written statement shall be the date of the first day of hearing within the meaning of Section 12(3) of the said Act. The petitioner shall appear before the trial Court on 15th December, 2004 at 11.30 a.m. and shall file written statement and take appropriate steps, if so desire, to contest the proceedings.

14. It is made clear that this Court has not expressed any opinion on merits on any of the points

sought to be raised and all the points are kept open to be agitated before the trial Court. Considering the fact that the matter relates to the year 1998 and is being remanded after disposal of the appeal by the lower Appellate Court, the trial Court shall expedite the hearing of the matter. The rule is made absolute accordingly with no order as to costs.

15. Certified copy be expedited.